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NTSB Order No. EA-4093

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of February, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. GREGORY A. McCONNELL, Respondent.	Docket SE-13423

OPINION AND ORDER

The Administrator has appealed from an order issued by Administrative Law Judge William A. Pope II granting respondent's motion to dismiss the Administrator's emergency order revoking respondent's mechanic certificate (with powerplant rating) at the conclusion of the Administrator's case in chief,[1] based on our decision in Administrator v. Grant, NTSB Order No. EA-3577

[1] Attached is an excerpt from the hearing transcript containing the law judge's order granting the motion to dismiss.

(1992). For the reasons stated below, we affirm the law judge's dismissal of this case. However, as discussed below, we give notice by this decision that we will not consider ourselves bound, in the future, by the reasoning in Grant.

The Administrator's emergency order charged respondent with returning a Continental GTSIO-520-H aircraft engine to service as airworthy on three separate occasions, when it was allegedly not airworthy due to numerous discrepancies specified in the complaint.[2] Respondent was charged with violations of 14 C.F.R. section 43.13(a) (failure to perform maintenance in accordance with methods, techniques and practices prescribed in current manufacturer's maintenance manual or other practices acceptable to the Administrator), and section 43.13(b) (failure to perform maintenance in such a manner, and to use materials of such quality, that the condition of the engine worked on is at least equal to its original or properly altered condition).

At the hearing, the Administrator presented extensive

[2] It was alleged that the engine was unairworthy after the first time respondent returned the engine to service (on February 26, 1993) because of a crack in the engine case. Soon after respondent's second return to service (on May 4, 1993, after repairs), the engine experienced a catastrophic failure and was allegedly discovered to be unairworthy in the following respects: improperly torqued bolts, inadequate lubrication, improper sealing of parting surfaces, and mismatching of crankcase halves, with one half having been previously rejected as too thin to be repaired. After respondent's third return of this engine to service (on August 13, 1993, after further repairs), it was alleged to be unairworthy because of: damaged pistons, scored bearings and oil pump, severely damaged inner case structure, improper camshaft, undertorqued bolts, excessive spalling on gears, cracked intake and exhaust valves, and excessive wear on valves and valve guides.

testimonial, documentary, and photographic evidence relating to the alleged unairworthy condition of the subject engine. At the conclusion of the Administrator's presentation of his case in chief, respondent made a motion to dismiss based on the Administrator's failure to prove that the aircraft in which the engine was installed had a U.S. airworthiness certificate. Respondent cited Administrator v. Grant, in which we upheld the law judge's dismissal of a similar case due to the Administrator's failure to introduce evidence establishing that the maintained/repaired part was installed on an aircraft that had a U.S. airworthiness certificate, and thus was subject to the standards of 14 C.F.R. Part 43.[3]

The Administrator responded to respondent's motion with four arguments, which he has repeated on appeal: 1) respondent should be precluded from relying on Grant because he did not include that case in his response to the law judge's pre-trial order requiring the parties to provide a list of citations to all cases and other authority upon which they intended to rely, and the

[3] **§ 43.1 Applicability.**

(a) Except as provided in paragraph (b) of this section [pertaining to aircraft with experimental airworthiness certificates], this part prescribes rules governing the maintenance, preventive maintenance, rebuilding, and alteration of any --
(1) Aircraft having a U.S. airworthiness certificate;
(2) Foreign-registered civil aircraft used in common carriage or carriage of mail under the provisions of Part 121, 127, or 135 of this chapter; and
(3) Airframe, aircraft engines, propellers, appliances, and component parts of such aircraft.

Administrator, whose counsel was not aware of Grant until respondent's motion to dismiss, was severely prejudiced thereby; 2) this case, unlike Grant, contains evidence which raises a rebuttable presumption that the aircraft did have a U.S. airworthiness certificate;[4] 3) the holding in Grant that an aircraft must be shown to have a *valid* airworthiness certificate -- in combination with 14 C.F.R. 21.181(a)(1), which states that an airworthiness certificate is only valid so long as maintenance is performed in accordance with the standards of Part 43 -- creates a Catch 22 situation which renders Part 43 meaningless;[5] and 4) even absent any regulatory violations, the evidence of respondent's three improper returns to service of the engine in question is sufficient to support the allegation that respondent lacks qualifications to hold his mechanic certificate and should have been sufficient to defeat the motion to dismiss.

Upon careful consideration of the issues raised in this case we have concluded that the law judge did not err in granting

[4] Specifically, the Administrator points out that the aircraft in which the engine was installed (N7649Q) was thereafter operated by a licensed pilot, and argues that, in light of the presumption in favor of legality, we should presume that the pilot was operating in compliance with section 91.203(a), which prohibits operation of a civil aircraft unless it has within it an appropriate and current airworthiness certificate.

[5] The Administrator submits that section 43.1(a) could be read so as to only require a showing, either that the aircraft in question is eligible for a U.S. airworthiness certificate (i.e., that it is U.S. registered), or that the aircraft had been issued such a certificate at one time. The Administrator asserts that both showings were made in this case, and reiterates his argument that a presumption exists in this case that the aircraft had a U.S. airworthiness certificate.

respondent's motion to dismiss. While it is true that respondent failed to provide advance notice that Grant was a case upon which he intended to rely, he could not have been expected to know, prior to the close of the Administrator's case in chief, that the Administrator would fail to introduce proof of an essential element of the charged offenses. Accordingly, we cannot fault respondent for failing to include authority on that point in his pre-trial submissions.

As for the Administrator's second argument, his reading of Grant is simply incorrect. In that case we rejected the same argument raised here: that the Board should assume that the aircraft had an airworthiness certificate because it was a civil aircraft and cannot be operated legally without one. NTSB Order No. EA-3577 at 7.[6] Contrary to the Administrator's argument, our use of the word "assume" in Grant, rather than "presume," is of no import. We further note that the Administrator's argument, in both Grant and in this case, relies on section 91.203(a)(1), which requires that an aircraft have within it an "appropriate and current airworthiness certificate." However, the next sentence of that section (regarding any "U.S. airworthiness certificate used to comply with this subparagraph") makes clear by implication that a *U.S.* airworthiness certificate is not the

[6] Although in this decision we reverse Grant to the extent it holds that the Administrator must introduce direct proof, rather than rely on a presumption to establish that an aircraft has a U.S. airworthiness certificate, the Grant decision was valid precedent upon which respondent was entitled to rely at the time respondent made his motion to dismiss.

only way to comply with the requirement of that section.

Regarding the Administrator's third argument, we agree that in cases involving violations of Part 43 it would often be impossible for the Administrator to show that an aircraft had a *valid* airworthiness certificate, and that a better reading of section 43.1(a) would be to require only a showing that the aircraft had been issued an airworthiness certificate. However, this point is not helpful to the Administrator's appeal in this case since he did not prove by the direct evidence required by Grant that the aircraft in question had any airworthiness certificate, valid or invalid.

Finally, we find no abuse of discretion in the law judge's rejection of the Administrator's fourth argument. Even if, as the Administrator asserts, respondent's lack of qualifications could have been established without reference to any regulatory violations, we think the law judge had no choice but to grant respondent's motion to dismiss in view of the similarities between this case and Grant.[7]

Despite our affirmance of the law judge's dismissal in this case based on Grant, we have reservations about that case's inflexible requirement that direct proof of the existence of a U.S. airworthiness certificate must be produced to avoid dismissal. Thus, while we continue to believe that the Administrator should be prepared, in every case, to introduce

[7] We note that Grant was also an emergency revocation action in which the same argument regarding lack of qualifications could have been made.

direct evidence of all essential elements of the violations charged in his complaint,[8] we do not think it is necessarily inappropriate, especially in ruling on a motion to dismiss, to recognize that a rebuttable presumption concerning the existence of an airworthiness certificate arises whenever a mechanic certifies as serviceable or airworthy an aircraft or part that he has maintained under the aegis of his FAA-issued mechanic certificate. Hence, we hereby give notice that we will no longer consider our decision in Grant, or in this case, to be controlling, and that a respondent who wishes to challenge the existence of a U.S. airworthiness certificate should do so at the earliest opportunity in the proceeding, generally in answer to the Administrator's complaint.[9] This will ensure that public monies are not wasted in trying cases that might have been subject to early dismissal.

[8] The Administrator has not argued that obtaining direct proof of a U.S. airworthiness certificate is a difficult or burdensome task.

[9] We recognize that it may be burdensome for a mechanic -- who often does not own or even have access to aircraft into which maintained parts are ultimately installed -- to obtain proof that the aircraft in question lacks a U.S. airworthiness certificate. On the other hand, we presume that it is a fairly simple matter for the Administrator to obtain documentation from the FAA's official registry that the aircraft either does or does not have such a certificate. Accordingly, we hold that -- when the matter has been specifically put into issue by the respondent -- the burden of producing direct evidence on this point is on the Administrator.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and

2. The law judge's order dismissing the complaint is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.